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No. 444

In the Supreme Court of the United States

OCTOBER TERM, 1952

STANLEY J. ORLOFF, PETITIONER

v.

COLONEL REX E. WILLOUGHBY, COMMANDANT, FORT LAWTON, SEATTLE, WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 44–49) is reported at 195 F. 2d 209. The opinion of the District Court (R. 42–43) is reported at 104 F. Supp. 14.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1952 (R. 49), and a petition for rehearing was denied on April 17, 1952 (R. 49–50). The petition for a writ of certiorari was filed on July 14, 1952 and was granted on Novem-

ber 10, 1952 (R. 51). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a doctor inducted into the Army under the Doctors' Draft Law may be utilized by the Army as a medical doctor without being granted a commission.

2. Whether petitioner is being utilized as a doctor.

STATUTE AND PRESIDENTIAL PROCLAMATION INVOLVED

Public Law 779, 81st Cong., 2d sess., 64 Stat. 826, as amended by Public Law 51, 82d Cong., 1st sess., 65 Stat. 88, 50 U. S. C. App., Supp. V, 454 (i), provides in pertinent part:

> (1) * * * the President is authorized to require special registration of and, on the basis of requisitions submitted by the Department of Defense and approved by him, to make special calls for male persons qualified in needed—
>
> (A) medical and allied specialist categories who have not yet reached the age of fifty at the time of registration, and
>
> (B) dental and allied specialist categories who have not yet reached the age of fifty at the time of registration.
>
> * * * * *
>
> (2) In registering and inducting persons pursuant to paragraph (1) of this subsection, the President shall, to the extent that

he considers practicable and desirable, register and induct in the following order of priority:

First. Those persons who participated as students in the Army specialized training program or similar programs administered by the Navy, and those persons who were deferred from service during World War II for the purpose of pursuing a course of instruction leading to education in one of the categories referred to in clauses (A) and (B) of paragraph (1) of this subsection, who have had less than ninety days of active duty in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service subsequent to the completion of or release from the program or course of instruction (exclusive of the time spent in postgraduate training).

Presidential Proclamation 2906, October 6, 1950, 15 F. Reg. 6845, 6847, as amended by Presidential Proclamation No. 2915, December 28, 1950, 15 F. Reg. 9419, provides in pertinent part:

1. Every male person who participated as a student in the Army specialized training program or any similar program administered by the Navy, or was deferred from service during World War II for the purpose of pursuing a course of instruction leading to education in a medical, dental, or allied specialist category, and has had less than twenty-one months of active duty

in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service subsequent to the completion of, or release from, such program or course of instruction (exclusive of time spent in postgraduate training), and who, on the day or any of the days hereinafter fixed for his registration (a) shall have received from any school, college, university, or similar institution of learning, one or more of the degrees of bachelor of medicine, doctor of medicine, doctor of dental surgery, doctor of dental medicine, doctor of veterinary surgery, and doctor of veterinary medicine, (b) is within any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, (c) is not a member of any reserve component of the armed forces of the United States, and (d) shall not have attained the fiftieth anniversary of the day of his birth is required to and shall on that day or any of those days present himself for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days.

2. The special registration of the male persons required to submit to registration by paragraph numbered 1 hereof shall take place in the several States of the United

States, the District of Columbia, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands between the hours of 8:00 a. m. and 5:00 p. m. on the day or days hereinafter designated for their registration, as follows:

(a) Persons who shall have received any of the degrees above referred to on or before October 16, 1950, shall be registered on Monday, the 16th day of October, 1950.

STATEMENT

A. THE STATUS OF THE CASE BEFORE THE COURT OF APPEALS

In late 1942, petitioner, who was then 18 years old and had completed two years of pre-medical training, applied for and was granted a commission as a Second Lieutenant in the Medical Administrative Corps of the Army (Resp. Ex. 3, pp. 46–47). A few months later, on June 5, 1943, he resigned his commission and enlisted in the Army Specialized Training Program as a medical student (Resp. Ex. 3, p. 38). From that time until he was separated from the Army, on August 14, 1945, he attended medical school at Government expense (Resp. Ex. 3, p. 100). On May 15, 1946, he graduated from medical school (R. 5, 10–11; Resp. Ex. 3, p. 28). Thereafter, he specialized in psychiatry (R. 11).

In 1951, petitioner became liable to induction under the provisions of Public Law 779, 81st

Cong., 2d sess., 64 Stat. 826,[1] 50 U. S. C. App., Supp. V, 454 (i), *supra*, pp. 2–3, commonly called the Doctors' Draft Law, which authorizes the President to require special registration of, and to make special calls for, men trained in medical and allied specialist categories who have not reached the age of 50 (R. 2–3). He applied for and was granted a commission as Captain in the Medical Corps, United States Air Force Reserve, but was discharged a few days later because he refused to execute the loyalty certificate required of commissioned officers (R. 11; Resp. Ex. 3, pp. 5, 8, 15), which, *inter alia*, requested information as to membership in or association with organizations designated by the Attorney General as totalitarian, fascist, communist, subversive, or which advocated force and violence to obtain a change in government or to deny certain individuals their constitutional rights (Resp. Ex. 3, pp. 23–27). At that time, he gave as his reasons for refusing to execute the loyalty certificate that, to quote him (Resp. Ex. 3, p. 15), "as a matter of conscience, I object to filling out the loyalty certificate because it involves an inquisition into my personal beliefs and views. Moreover, the inquiry into organizational affiliations employs the principle of guilt by association, to which I am vigorously opposed. Further, it is my under-

[1] The termination date of the Act was extended to July 1, 1953, by Public Law 51, 82d Cong., 1st sess., 65 Stat. 88.

standing that all the organizations were listed by the Attorney General without notice or hearing which has caused the Supreme Court to invalidate it."

Thereafter, on July 26, 1951, petitioner was inducted into the Army under the provisions of the Doctors' Draft Law. Like all persons drafted into the Army, he was inducted as a private.[2] (R. 5–6.)

After the induction and reception processing, petitioner was transferred to the Medical Replacement Training Center at Fort Sam Houston, Texas, for sixteen weeks of basic military orientation training (R. 6). Upon completion of this training, he was assigned a "potential military occupation specialty" as a medical laboratory technician, and, on November 30, 1951, was ordered to report to Fort Lawton, Washington, Personnel Center, by December 19, 1951, subsequently extended to December 29, for transfer to the Far East Command (R. 6; Ex. 5).

In the interim, petitioner was given leave, during which time he went to Washington, D. C. (R. 13). There, after consulting high ranking officers of the Army Medical Service, on December

[2] Because Public Law 779 was designed not only to grant authority to draft doctors but also and primarily to induce doctors who are about to be drafted into voluntarily entering the Armed Forces medical reserves, petitioner was one of the first persons inducted under that Act. As of November 1952, 22 doctors and dentists had been drafted under the Act (see *infra*, p. 20).

10, 1951, he applied for a commission in that service (R. 6). In connection with this application, he did file the required loyalty certificate but did not fully supply the requested information with respect to the listed organizations. He stated (Resp. Ex. 2, p. 10): "I have attended public meetings of the Civil Rights Congress and the National Council of American-Soviet Friendship. In 1943, I co-authored a radio play for the latter organization. Over a period of 7½ months I attended classes at the Jefferson School of Social Sciences (ending in the Spring of 1950). With respect to any other organizations contained on the annexed list I am compelled to claim my Federal Constitutional Privilege. However, I have never considered myself an organizational member of any of the aforesaid." In reply to a question, "Are you now or have you ever been a member of the Communist Party, U. S. A. or any Communist Organization", petitioner wrote, "Federal constitutional privilege is claimed" (Resp. Ex. 2, p. 22). Petitioner's application for a commission was pending at the time of the hearing in the District Court. We are informed that it has since been denied.

On December 29, 1951, petitioner reported as ordered to the Enlisted Replacement Center, Fort Lawton, Seattle, Washington (R. 6). On that day (R. 15), he filed the instant petition for a writ of habeas corpus, seeking his discharge from

the Army on the ground that, since he had been inducted under the special draft law relating to doctors, the Army must either use him as a doctor or discharge him, and that since he had been designated as a medical laboratory technician, he was not being so employed (R. 1–3).[3] An order to show cause was issued (R. 3–4) and respondent filed a return (R. 4–7) and an answer to the petition (R. 7–10), taking the position that Public Law 779 did not require the Army to use doctors inducted thereunder as doctors. After a hearing, held on January 9, 1952, the District Court discharged the order to show cause and dismissed the petition (R. 42–43), holding "that the law itself does not require that the person, or doctor, drafted under the Act must serve as a doctor" (R. 42).

On appeal, the Court of Appeals for the Ninth Circuit affirmed, and a petition for a rehearing was denied on April 17, 1952. Judge Goodman at first concurred in the affirmance, but later, on the petition for rehearing, dissented from the majority holding (R. 44–50; 195 F. 2d 209). The majority of the court found it unnecessary to pass on the question whether doctors drafted under the special Doctors' Draft Law could be utilized entirely outside the medical field (R. 46), since peti-

[3] On December 13, 1951, petitioner had filed a petition for a writ of habeas corpus in the District Court for the District of Columbia, naming high Defense Department officials as respondents (R. 6). This petition was dismissed for lack of jurisdiction, 101 F. Supp. 750.

tioner's assignment as a medical laboratory technician represented employment "in a type of work for which his medical training renders him peculiarly adaptable" (R. 46). In view of that fact, the majority concluded that petitioner was lawfully in the custody of the Army.

B. THE PRESENT STATUS OF THE CASE

On March 26, 1952, petitioner applied to the Court of Appeals for a stay. After it was explained to the court that the Army had assigned petitioner to a "detached service status", whereby he remained subject to the orders of the Commanding Officer of Fort Lawton, who could recall and produce him in response to a court order from any place to which he might be assigned, the Court of Appeals denied the application. On application to Mr. Justice Douglas, a stay was originally granted. Subsequently, on May 3, 1952, on motion of the respondent, the stay was modified to provide that "so long as petitioner retains his 'detached service status,' he may be assigned anywhere within the United States." *Orloff* v. *Willoughby*, 72 S. Ct. 998.

Immediately thereafter, on May 6, 1952, petitioner was designated a psychiatrist performing psychiatric duties and was transferred in detached duty status to Madigan Army Hospital, Tacoma, Washington, for duty as a psychiatrist performing psychiatric duties (Appendix A, *infra*, p. 30).

In opposition to the petition for certiorari, the government called attention to petitioner's assignment, since it appeared to render moot the sole issue raised by the petition, i. e., whether a person inducted into the Army under the Doctors' Draft Law must be utilized as a doctor.[4]

In reply, petitioner alleged that the authority which inheres in practice as a doctor, in military service "only accompanies rank as a commissioned officer." He attached an affidavit listing the conditions which had been imposed upon him and alleged that because of these limitations he was not being utilized as a doctor. The Surgeon General in reply explained the limitations imposed on petitioner and the reasons therefor.

Petitioner is assigned to Madigan hospital as a psychiatrist performing psychiatric duties. He "elicits histories from patients, performs physical, psychiatric and neurological examinations, establishes diagnoses and carries out such psychotherapy as is indicated in the management of cases assigned to him. He also writes up charts, procures laboratory and psychological tests and social service reports, as are indicated in the diagnoses and treatment of his patients." He "per-

[4] It is proper to bring to the Court's attention facts dehors the record which demonstrate that a case has become moot. Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland Ed. 1951), § 275, and cases there cited; Stern and Gressman, *Supreme Court Practice* (1950), pp. 339–340.

forms consultations requested by other departments of the hospital, issues medical certificates when indicated, presents cases for action by the medical board and to conferences conducted by the psychiatric consultant." He attends all staff conferences, including conferences conducted by the consultants. In addition, petitioner has been given the opportunity to evaluate the validity of a psychiatric test upon which he had been working prior to his induction into the Military Service. (Appendix B, *infra*, pp. 31–32.)

While on duty, petitioner is dressed in the normal duty uniform worn by doctors in the Army, a white medical coat without insignia of rank. He is addressed by his associates, nurses, technicians and patients as "Doctor." In the course of his professional treatment of patients, he gives orders to nurses and medical technicians which are carried out without question. (Appendix C, *infra*, p. 36.)

Restrictions have been placed upon petitioner based upon "evaluation of his overall qualifications and not affected by the fact of his enlisted status." These limitations have been imposed by the commanding officer in accordance with his duty to "determine the manner in which each doctor can best exercise these qualifications in a team approach to discharging the hospital's responsibilities." (Appendix C, *infra*, pp. 33–34.)

The only restriction that results from petitioner's lack of commissioned status is that he is not

permitted to act as a member of Medical Boards since Army regulations provide that only commissioned officers may be assigned as members of such boards. That, however, is not a restriction on his professional duties. The Medical Boards are administrative in character and perform duties relating to the internal management of the Army. (Appendix C, *infra*, p. 35.)

The only restriction upon petitioner which is uncommon is that he is precluded from prescribing drugs and sedatives and administering injections. This restriction has been imposed for security reasons since "Security information, which could not otherwise be obtained, may be elicited from patients while under the influence of sedatives and other drugs." (Appendix C, *infra*, pp. 34–35.)

The remaining restrictions imposed on petitioner are normally placed on other psychiatrists assigned to duty at the hospital. Thus, only the Chief and Assistant Chief of the Neuropsychiatric Service are authorized to administer shock and convulsive therapy. Petitioner is not permitted to act as a member of the Therapy Board because the board is composed of the chiefs of the several services, and there are many commissioned medical service officers who are not members of such Board. (Appendix C, *infra*, pp. 34–35.)

The Surgeon General has stated, "If Dr. Orloff were relieved from duty, it would be necessary to replace him with another Psychiatrist" (Appendix C, *infra*, pp. 36–37).

SUMMARY OF ARGUMENT

On the issue presented by the petition for certiorari—whether a physician drafted under the Doctors' Draft Law must be utilized in his professional capacity—the government concedes that he must be so used. The narrower issue presented by the decision of the Court of Appeals, as to whether assignment as a medical laboratory technician is a sufficient utilization of professional medical skills, is now moot, for the Surgeon General has assigned petitioner to duty as a doctor and states that he will be so used during his period of service.

I

However, petitioner has suggested that no doctor can properly be used as such without a commission. In this contention, he is in error. Although, until the enactment of Public Law 779, it had been the practice of the Armed Forces not to accept those doctors and dentists who did not possess the qualifications of an officer, there is nothing in Army regulations which prohibits the use of non-officer doctors to perform medical services. The legislative history of the Doctors' Draft Law shows that Congress rejected proposals to require the Armed Forces either to commission or reject drafted doctors or dentists, even though Congress was made aware of the fact that occasions might arise where commissions could not be

tendered or where tendered commissions might be rejected.

Petitioner was one of the first doctors to be inducted under the Doctors' Draft Law, since he had received part of his medical education at government expense and had not thereafter been in active service with the Armed Forces. When he claimed the privilege against self-incrimination as to loyalty questions, the Army was clearly justified in refusing to grant him a commission. An officer's loyalty must not be open to question. On the other hand, to refuse to use his services would have violated at least the spirit of the Doctors' Draft Law, for, if petitioner were discharged, some other doctor would have to be drafted in his place. The only fair and practical alternative was to do what the Army has done, i. e., use his professional services without granting him a commission.

II

Although the issue of whether petitioner's present assignment does in fact represent a utilization of his services as a doctor was not decided by the courts below, we believe that the facts are sufficiently clear so that this Court may finally dispose of the cause without adopting petitioner's suggestion that the matter be remanded for further hearing on this issue.

Petitioner is performing duties which only a doctor can perform. He is addressed and treated

as a doctor. The Surgeon General has stated that, if petitioner were relieved from duty, it would be necessary to replace him with another psychiatrist. He is thus clearly being utilized as a doctor.

His objections to the restrictions imposed upon him raise no issue for judicial determination. A court cannot decide matters of internal management of a hospital, and particularly of an army hospital. All doctors in the Army are subject to restrictions which do not pertain to doctors in civilian life.

ARGUMENT

INTRODUCTORY ANALYSIS AND DISCUSSION OF ISSUES

The question presented by the petition for certiorari is as follows:

> Whether the petitioner who is outside the age limits for the regular draft, but was drafted solely because he is a doctor, pursuant to a statute which authorizes the induction of doctors, may be retained in the Army even though the Army refuses to use him as a doctor.[5]

On this issue there is no disagreement between petitioner and the Government. Despite the position taken by the attorneys for respondent below, the Government now concedes that doctors in-

[5] The second question raised the question of constitutionality if the first were answered in the affirmative.

ducted under the Doctors' Draft Law must be utilized in their professional capacity. Since the purpose of the statute was to subject to the draft special classes of persons over 26 who would not be inducted except for the need for their professional qualifications, it was clearly intended that when drafted such persons should be used professionally.

There is not presently involved even the narrower issue presented by the decision of the Court of Appeals, i. e., whether use of a physician as a medical laboratory technician represents a sufficient use of a physician's specialized training to be deemed a utilization of his services as a physician.[6] Petitioner is now assigned to duty as a psychiatrist performing psychiatric services. We have been assured by the Surgeon General that

[6] Actually it has always been the policy of the Army to utilize professional personnel in the performance of appropriate professional duties commensurate with their professional training and experience (see Statement of the Surgeon General, Res. Ex. 4). But petitioner presented a new situation, and specific policy as to how to utilize the professional services of non-officer doctors had not been established. Petitioner's designation as a laboratory technician was designed to utilize his services in his professional field. Obviously, there is considerable laboratory work which demands medical training and medical skills. Since petitioner began this action before he entered on any duties, he was hardly in a position to assert that his medical skills were not being utilized. The policy now is to use such personnel in the same manner as commissioned personnel. See letter from the Surgeon General to the Judge Advocate General, annexed as Appendix D, *infra*, pp. 37–38.

petitioner will continue to be utilized as a doctor, although not necessarily at his present post, since, like all other persons in the Army, he will be subject to transfer in accordance with the needs of the Army. The Surgeon General, in a letter to the Judge Advocate General set forth as Appendix D, *infra,* pp. 37–38, has stated that it is the policy of his office to utilize the professional training of all non-officer personnel inducted under the Doctors' Draft Act. This policy "is identical to the policy followed in the case of physicians, dentists and veterinarians who enter the active military service in a commissioned status."

As the case comes before this Court, therefore, it presents issues not presented to and not determined by the Court of Appeals and not raised in the petition for certiorari. In the District Court and in the Court of Appeals, petitioner did not claim that Public Law 779 required that he be commissioned; his attorney stated in the District Court that "there is no question involved in this case, so far as the Petitioner is concerned, as to the Army's granting him a commission or not granting him a commission." (R. 21.) Nevertheless, in opposition to the government's contention that the issue presented by the petition for certiorari had become moot, and in support of his claim that he is not in fact now being utilized as a doctor, petitioner has suggested that, in the Army, no physician can properly act as such unless he has the authority which stems from the status of an

officer (see Statement, *supra*, p. 11). As we see it, therefore, the only legal issue which the cause in its present posture presents for decision is this new issue as to whether a doctor may be utilized as such in the Army without a commission. We discuss this in Point I, *infra*, pp. 19–26. There is also a factual question raised by the reply to the opposition to certiorari as to whether petitioner's present assignment represents a utilization of his services as a physician in view of the restrictions imposed on him. That is an issue which petitioner suggests should properly be remanded for consideration by the District Court after a hearing. While we have no objection to such a disposition of the cause on this issue, we believe that on the basis of undisputed facts, the situation is sufficiently clear so that this Court may fully dispose of the cause on the papers before it. See Point II, *infra*, pp. 26–29.

I

A PHYSICIAN MAY BE UTILIZED IN HIS PROFESSIONAL CAPACITY IN THE ARMY WITHOUT A COMMISSION

Prior to the enactment of Public Law 779, the Medical Services of the Army and Navy had obtained all of their doctors by voluntary enlistment.[7] Since 1847,[8] it had been the practice of

[7] Even those secured through the Armed Forces Specialized Training Program were obtained by voluntary enlistment in that program.

[8] The Army was authorized to commission doctors by the Act of February 11, 1847, 9 Stat. 123, 124–125.

the Armed Forces Medical Services to commission doctors and dentists, and not to accept those doctors and dentists who did not possess the qualifications of an officer. Nevertheless, contrary to the statement of respondent's attorneys in the court below, there is nothing in Army regulations which prohibits the Army from using non-officer doctors to perform medical services (Appendix D, *infra*, pp. 37–38).

Public Law 779 was designed both to grant authority to draft doctors and dentists and to induce doctors and dentists selected for induction to join the Armed Forces Medical Services Reserves, by providing that any doctor or dentist who voluntarily joined such reserves would receive $100 additional pay per month (Hearings on H. R. 9554 before House Committee on Armed Services, 81st Cong., 2d sess., pp. 7172–7173, 7220–7223).[9] When Congress was considering proposals to draft doctors, dentists and allied specialist categories, the Defense Department stated that it intended to

[9] Because of this feature, it has been unnecessary to draft many doctors or dentists under that law. By October 13, 1952, 6,049 doctors and dentists had been obtained under the influence of the Doctors' Draft Law (Appendix E, *infra*, pp. 38–39), while by November 20, 1952, we are informed, only 22 had been inducted. Even those inducted who are qualified to become officers are, after their basic military training, offered commissions in the reserves. To date there are only three doctors and dentists in the Armed Forces who are disqualified for a commission, and have not or will not be commissioned; all of these are, however, being utilized professionally.

tender commissions to drafted doctors and dentists (Hearings before House Committee on Armed Services, 81st Cong., 2d sess., on H. R. 9554, pp. 7164, 7166–7167, 7223). Congress, however, rejected proposals to require the Department to do so, despite the fact that it was made fully aware that occasions might arise where commissions could not be tendered or where tendered commissions might be rejected.

The bill was not extensively debated in either House of Congress but was carefully considered by the appropriate committee of both Houses of Congress. Both the American Medical Association and the American Dental Association, in oral and written testimony by their representatives accompanied by a proposed draft of an amendment, recommended to the committees of both houses that the bill be amended to provide that any person selected for induction who applies for a commission should be deferred for induction for 60 days or until his application is rejected, whichever is earlier, and to provide "That no person shall be inducted after he is rejected for a commission unless he falls within the age group" of 18 to 26 (Hearings before the House Committee on Armed Services, on H. R. 9554, 81st Cong., 2d sess., pp. 7191, 7199, 7199–7201, 7202, 7203, 7208; Hearings before Subcommittee of Senate Committee on Armed Services, 81st Cong., 2d sess., on S. 4029, pp. 11, 19, 21, 22, 23–24). Dr. Adams, President of the American Dental Association, pointed out

to both committees that the bill "does not provide a mechanism to require the commissioning of at least the medical and dental personnel who might be inducted under its terms" (House Hearings, *supra*, pp. 7199, 7202; Senate Hearings, *supra*, p. 21). In recommending the amendment, he stated that "the association has in mind such requirements of the Armed Forces as those which require an officer to have a minimum height of five feet four inches whereas an individual is qualified * * * as an enlisted man if nature has granted him but five feet two inches of height," and the requirement that an officer have proper "color perception" (House Hearings, *supra*, pp. 7200, 7208; Senate Hearings, *supra*, p. 24).

Despite these recommendations, nowhere in the legislative history of the Act was there any suggestion by any member of Congress that the bill should require the armed services either to commission or reject doctors and dentists,[10] and no such provision was adopted.

Congress was also made aware that some doctors might refuse commissions and thus would have to serve in a non-officer status. General Robinson, representing the Surgeon General of the Army, testified that a doctor would be drafted as a private and that, if he did not accept the commission tendered him, "he would remain on

[10] Congress also rejected a recommendation by the American Osteopathic Association to amend the bill to require the commissioning of osteopathic doctors drafted under the Act. When this recommendation was made by representatives of

as an enlisted man" (House Hearings, *supra*, p. 7164). Thus, it is clear that Congress did not intend to require that the Armed Forces either commission or discharge drafted doctors.

Petitioner argues, however, that his services as a doctor cannot be fully utilized by the Army unless he is commissioned. This same argument was made to Congress by the American Dental Association and the American Osteopathic Association (House Hearings, *supra*, pp. 7202, 7208, 7214; Senate Hearings, *supra*, pp. 24, 65). Yet, as we have shown, Congress did not require that persons drafted under the special draft law be commissioned. Apparently Congress thought that the Armed Forces could adjust their systems when presented with non-officer medical personnel, so that their professional services could be utilized. That has now been done.

It seems too clear to merit discussion that a person liable for service under the law should not be

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the American Osteopathic Association (House Hearings, *supra*, pp. 7214, 7215; Senate Hearings, *supra*, p. 63), they pointed out to the committees that the Army had never commissioned osteopathic doctors (House Hearings, *supra*, p. 7213); Senate Hearings, *supra*, pp. 60–65) and contended that their services as osteopathic doctors could be utilized to maximum extent only if they were commissioned (House Hearings, *supra*, p. 7214; Senate Hearings, *supra*, p. 65). Nevertheless, no member of Congress suggested that the bill be amended to require the Armed Services to commission drafted osteopathic doctors, although the Chairman of the House Armed Services Committee stated that "Certainly everybody is going to use them where they are qualified to be used" (House Hearings, *supra*, p. 7215).

able to escape duties imposed on others of his class by the simple expedient of refusing a commission. It seems equally clear that such a person should not be allowed to escape such duties because he has been found not to have the qualifications necessary for officer status.

Petitioner received much of his medical education at government expense, and, although he was only 27 years old when he was inducted, he had never served in the Armed Forces except for a short period before and while he was attending medical school. He thus fell within the first group to be inducted under the Doctors' Draft Law. When, in applying for a commission after his induction, petitioner claimed the privilege of self-incrimination with respect to loyalty questions, three alternatives were presented. The Army could shut its eyes to the issue of loyalty and commission petitioner as an officer; it could refuse to use petitioner's services although he was of the class first liable to induction; or it could do what it has done, i. e., use his services without granting him a commission.

The Army was clearly justified in not adopting the first alternative. As we have shown, despite the previous practice in the Army, nothing in the Doctors' Draft Law or in Army regulations requires that doctors be commissioned. And certainly the Army could properly feel that a person who had first refused to answer questions as to his loyalty and who had subsequently claimed the

privilege against self-incrimination on loyalty questions is not fit officer material. An officer's loyalty must not be open to question. The Army could not expect to obtain the necessary disciplined obedience of the non-commissioned personnel if there were any doubt as to the loyalty of their officers. Moreover, by simple virtue of his rank, a commissioned officer has access to certain classified information, available to all officers, which could not in any practical way be kept from a particular officer.

On the other hand, to refuse to use petitioner's services would have violated at least the spirit of the Doctors' Draft Law. If petitioner's services were not utilized, some other doctor would have to be drafted in his place, perhaps one who had not received his education at government expense or who had already served in the Armed Forces. Moreover, if a person could escape service by refusing to answer loyalty questions, a loophole for evasion would be opened. Presumably, very few loyal doctors would try to avoid service on such a ground. Nevertheless, this law, which necessarily imposes an unusual burden upon a limited professional group, must not be so administered as to permit even a few unscrupulous doctors to evade the military service which Congress, in the interest of national defense, has found it necessary to require.

The course adopted by the Army, of using the professional services of those properly drafted

under the Doctors' Draft Law, but denying commissions to those found unfit for officer status, accords with both the spirit and the letter of the law. Petitioner is therefore not entitled to be released from the Army.

II

PETITIONER IS BEING UTILIZED AS A DOCTOR

It is undisputed that petitioner is presently assigned to duty as a psychiatrist performing psychiatric duties.[11] He is addressed and treated as a doctor. He performs duties which only a doctor can perform. The Surgeon General has stated that if petitioner "were relieved from duty, it would be necessary to replace him with another Psychiatrist" (App. C, *infra*, pp. 36–37).

Admittedly, as a member of the medical staff of a large military hospital, petitioner does not enjoy the complete freedom of action of a doctor in private practice. Even in civilian life, a doctor attached to a clinic or hospital is a member of a medical team to which the member doctors

[11] The facts as to petitioner's present duties are taken from documents already filed with this Court in connection with the question of mootness of the issue presented by the petition for a writ of certiorari. Thus, Appendices A and B, *infra*, pp. 30–32, were annexed to our memorandum in opposition to certiorari, and Appendix C, *infra*, pp. 33–37 to our reply to petitioner's reply to our opposition. These facts were not denied in petitioner's affidavit attached to his reply. The additional matters set forth in his affidavit are discussed in the text.

contribute various specialized skills and in which group decisions are both routine and beneficial. In a military hospital, moreover, there is a concentration of ultimate authority and responsibility in the higher ranking medical officers. Thus, while petitioner complains that he is not allowed to administer shock and convulsive therapy, the fact is that at Madigan Army Hospital only the Chief and Assistant Chief of the Neuropsychiatric Service are authorized to administer such treatments (App. C, *infra*, pp. 34–35).

The only restriction which has been placed upon petitioner because of his lack of a commission is that he may not serve as a member of Medical Boards. These Boards, which under Army Regulations must be composed of commissioned officers, perform administrative functions, such as determining physical disability as a basis for retirement or discharge. Clearly, the fact that petitioner does not participate in such decisions in no way precludes full utilization of his training and abilities in essential medical work.

The only restriction upon petitioner's functioning as a doctor which is unusual in the case of a doctor with his training and experience is that for security reasons he is not permitted to prescribe drugs and sedatives. Classified information may be elicited from patients under the influence of sedatives and other drugs. Petitioner's assertion of the privilege against self-

incrimination when he was asked to state whether he was a past or present member of the Communist Party amply justifies such a restriction. *American Communications Ass'n* v. *Douds*, 339 U. S. 382.

It is to be noted that the Army has assigned petitioner to work in his chosen specialty of psychiatry. Clearly, nothing in the Doctors' Draft Law requires the armed forces to assign a doctor to the particular type of medical work which he prefers or as to which he considers himself particularly well qualified. Rather, he is to be assigned according to the needs of the service as determined by his military superiors. Thus, if petitioner had been assigned to make relatively routine physical examinations, as are many doctors in the armed forces, it would be clear that he was being utilized as a doctor; at the same time, it would hardly be suggested that he could dictate his reassignment to more specialized work which he regards himself as competent to perform. It is clear that in his present assignment, even with the restrictions of which he complains, a far more effective use is being made of petitioner's experience and training than if he were assigned to relatively routine work, customarily performed by doctors, in which such restrictions would be irrelevant.

Petitioner's sole complaint at this stage of the litigation seems to be that without an officer's commission he will be so lacking in authority and

prestige that he cannot effectively function as a doctor in the Army. We believe that the Surgeon General's statements as to petitioner's duties and authority (App. C, *infra*, pp. 33–37) show the contrary and are conclusive as to the Army's ability effectively to utilize petitioner's professional skills.

In the light of these considerations, petitioner's demand that the courts overturn his assignment as not sufficiently "medical" in nature would require the judiciary to undertake an unprecedented and unwarranted supervision of the internal management of the armed forces.

CONCLUSION

In view of these undisputed facts, we believe that this Court can dispose of the case by itself determining whether the Army's utilization of petitioner is consistent with the purposes of the Doctors' Draft Law. In the alternative, the case can be remanded to the District Court for a determination as to whether petitioner is being utilized as a doctor.

WALTER J. CUMMINGS, JR.,
Solicitor General.

CHARLES B. MURRAY,
Assistant Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
MURRY LEE RANDALL,
Attorneys.

JANUARY 1953.

APPENDIX A

HEADQUARTERS FORT LAWTON

FORT LAWTON, WASHINGTON, *6 May 1952*

Special Orders
Number 117

EXTRACT

148. PVT-2 STANLEY J. ORLOFF US18152566, Co E, 6217 Enl Repl Cen, this sta, is designated Primary MOS 0564 (Psychiatrist performing psychiatric duties) UP SR615-25-15 and TWX TAG DA 326017 dtd 5 May 52.

149. PVT-2 STANLEY J. ORLOFF US-18152566 MOS 0564, Co E, 6217 Enl Repl Cen, this sta is reld fr atch'd 6013 ASU US Army Hosp Det this sta and placed on DS with 9952 TSU Madigan Army Hospital, Tacoma, Wash eff 7 May 52 for an indefinite period, for duty as Psychiatrist performing psychiatric duties. No per Diem Auth. AUTH: TWX TAG DA 326017 dtd 5 May 52.

BY ORDER OF COLONEL WILLOUGHBY:

OFFICIAL
C. C. LA RIVIERE (S)
WOJG, USA
Ass't Adjutant

HAROLD HOLDEN
Captain, Arty
Adjutant

True Copy:
(S) John J. Marren
JOHN J. MARREN
Colonel, MC
Chief, NP Service

APPENDIX B

MADIGAN ARMY HOSPITAL
TACOMA, WASHINGTON, *17 July 1952.*

MEDFM–NP

Subject: Duties of Dr. Stanley J. Orloff.

Thru: *Commanding Officer,*
Madigan Army Hospital.

To: THE SURGEON GENERAL,
Department of the Army,
Washington 25, D. C.,
Attn: Personnel Office.

1. Dr. Stanley Orloff reported for duty on the Neuropsychiatric Service 8 May 1952 under the provisions of Special Orders No. 117, Headquarters Fort Lawton, Washington, dated 6 May 1952, a true copy of which is attached hereto. He expressed an interest in the treatment of psychotic patients and was accordingly assigned to the Closed Ward Section of the Neuropsychiatric Service. In this capacity he elicits histories from patients, performs physical, psychiatric and neurological examinations, establishes diagnoses and carries out such psychotherapy as is indicated in the management of cases assigned to him. He also writes up charts, procures laboratory and psychological tests and social service reports, as are indicated in the diagnoses and treatment of his patients. He further completes the medical charts, including final diagnoses. The clinical records of his cases, as in the case of all doctors on the Staff, are approved for clearance and final disposition of the patient by either

the Chief of Service or Assistant Chief of Service who initials the 55A sheet of the clinical record before forwarding to the Machine, Records, Registration and Tabulating Section for processing.

2. Dr. Orloff performs consultations requested by other departments of the hospital, issues medical certificates when indicated, presents cases for action by the medical board and to conferences conducted by the psychiatric consultant who visits our hospital twice monthly. He attends all Staff Conferences, including conferences conducted by all our consultants. He is also in the process of supervising the preparation of a projective test for rapid differential diagnosis between organic and functional conditions, psychoses and neuroses. He had been working on this test prior to induction into the Military Service and has been given the opportunity to further statistically evaluate the validity of this test during his present assignment.

3. Dr. Orloff seems to be reasonably content in his present situation and is cooperative with the rest of our Staff in the performance of his duties.

(Sgd.) JOHN J. MARREN,
Colonel, MC,
Chief, NP Service.

Incl: Cpy SO No. 117.

APPENDIX C

DEPARTMENT OF THE ARMY
OFFICE OF THE SURGEON GENERAL

WASHINGTON 25, D. C., *21 October 1952.*

In Reply Refer To
MEDCM-B 201 Orloff, Stanley J. (EM)

ROBERT L. STERN, Esq.,
Acting Solicitor General,
Department of Justice,
Washington 25, D. C.

DEAR MR. SOLICITOR GENERAL: Reference is made to the affidavit of Dr. Stanley J. Orloff, attached to his Reply to the Respondent's Opposition to the Granting of the Petition for a Writ of Certiorari in the Supreme Court of the United States. This affidavit concerns his duties as a doctor assigned to the Neuropsychiatric Service, Madigan Army Hospital, Tacoma, Washington, and the limitations upon the scope of these duties to which exception is taken. I should like to comment on the reasons for such restrictions as exist, and at the same time present some of the considerations facing the commander of an Army hospital in the proper use of personnel assigned to him.

It is the responsibility of the commanding officer of an Army hospital to evaluate all qualifications of individual doctors assigned to his command, evaluation to include the degree of excellence in the abilities possessed. He must further determine the manner in which each doctor can best exercise these qualifications in a team approach to discharging the hospital's responsi-

bilities. The functions and duties which have been assigned to Dr. Orloff by the Commanding Officer of Madigan Army Hospital are based upon evaluation of his overall qualifications and not affected by the fact of his enlisted status. As a result of a personal interview with Colonel Emery E. Alling, Commanding Officer, Madigan Army Hospital, and an investigation made by this office, the following facts have been obtained concerning Dr. Orloff.

Dr. Orloff reported for duty with the Neuropsychiatric Service of Madigan Army Hospital, on 8 May 1952, pursuant to orders assigning him in an enlisted status for duty as a Psychiatrist. His orders, copy attached, direct his assignment and use as a Psychiatrist, in which position he was placed and has been used since the reporting date. The Commanding Officer had knowledge that Dr. Orloff did not possess all the qualifications necessary for a commission in the Medical Corps Reserve. After careful evaluation of all of Dr. Orloff's qualifications, a preliminary to definitive assignment of any doctor coming to this hospital, appropriate duties and responsibilities as a Psychiatrist were assigned to him and he became subject to certain limitations in activities outside these assigned duties. These limitations and the reasons therefor are as follows:

(1) Dr. Orloff is not permitted to prescribe drugs and sedatives for security reasons. Security information, which could not otherwise be obtained, may be elicited from patients while under the influence of sedatives and other drugs.

(2) Dr. Orloff is not permitted to perform

shock and convulsive therapy. Only the Chief and Assistant Chief of the Neuropsychiatric Service are authorized to administer such therapy. Other doctors of medicine serving in commissioned status at Madigan Army Hospital are not permitted to administer shock and convulsive therapy.

(3) He is not permitted to administer injections because of the general restriction on the use of drugs, injection being merely a mode of administration.

(4) Dr. Orloff is not permitted to perform spinal punctures because his Chief of Service, in distributing duties to doctors of medicine on his staff economically using abilities available to him, did not assign this duty.

(5) Dr. Orloff is not permitted to act as a member of Medical Boards. Army Regulations provide that only commissioned officers be assigned as members of Medical Boards. Such Boards are administrative in character and perform duties relating to the internal management of the Army.

(6) Dr. Orloff is not permitted to act as a member of the Therapy Board. This Board is composed of the Chiefs of the several Services. There are many commissioned Medical Corps officers on duty at Madigan who are not members of the Therapy Board.

Dr. Orloff has been on duty approximately five months at Madigan Army Hospital where he is occupying a position established for a Psychiatrist. His duties occupy his full time as a Psychiatrist performing the functions enumerated in letter dated 17 July 1952 from Chief of

the Neuropsychiatric Service, Madigan Army Hospital, to this office, inclosed herewith.

While on duty, Dr. Orloff is dressed in the normal duty uniform worn by doctors in the Army. This uniform consists of a white medical coat or operating gown without insignia of rank. He is addressed by his associates, by the nurses, the medical technicians, and the patients as "Doctor." In the course of his professional treatment of patients, he gives orders to nurses and medical technicians which are carried out without question.

In view of the responsibilities of a hospital commander to his patients and to the Army, few doctors are permitted unlimited practice within a hospital, and most of them are subject to some restrictions. In a large Army hospital, and this is equally true of large civilian hospitals, efficient use of physicians with differing kinds and degrees of ability requires a careful division of labor which often channels individual effort in highly specialized ways. The inevitable corollary to specialization is a nominal restriction on the activities of individuals within a given group. Doctors in the Army are constantly under study with a view of periodic re-evaluation directed to maximum employment of their skills and the development of individual potentiality better meeting military requirements.

The retrictions imposed on Dr. Orloff by the hospital commander were based on his evaluation of Orloff's total qualifications. It is desired to reemphasize that Dr. Orloff has been and is being utilized at Madigan Army Hospital as a doctor of medicine (Psychiatrist). If Dr. Orloff were

relieved from duty, it would be necessary to replace him with another Psychiatrist.

Sincerely,

(S) George E. Armstrong,
GEORGE E. ARMSTRONG,
Major General, The Surgeon General.

2 Incls.:
1. Cpy ltr fr Madigan Army Hospital to TSG dtd 17 Jul 52
2. Cpy SO 117, dtd 6 May 52

APPENDIX D

UTILIZATION OF AMEDS PROFESSIONAL PERSONNEL INDUCTED INTO THE ARMY

MEDCM-P

SURGEON GENERAL'S OFFICE

DEPARTMENT OF THE ARMY

THE JUDGE ADVOCATE GENERAL

14 JULY 1952.

Maj McKenzie/lfw 63632

1. Reference is made to your inquiry of 11 July 1952 regarding the policy of The Surgeon General with respect to the utilization of physicians, dentists and veterinarians who are inducted into the Army under the provisions of subsection 4 (i), Universal Military Training and Service Act, as amended.

2. Upon the completion of reception processing, the personnel referred to above are transferred to the Medical Replacement Training Center, Camp Pickett, Virginia for the purpose of re-

ceiving orientation regarding their newly acquired military status in particular and the functions and operations of the Army in general. This orientation period is considered to be a basic requirement for all soldiers regardless of their civilian training and experience.

3. Upon completion of the orientation period referred to above, it is the policy of The Surgeon General to utilize the professional personnel in question in the performance of appropriate professional duties commensurate with their professional training and experience. This policy of personnel utilization is identical to the policy followed in the case of physicians, dentists and veterinarians who enter the active military service in a commissioned status.

S. B. HAYS,
Major General, M. C.,
Acting The Surgeon General.

APPENDIX E

DEPARTMENT OF THE ARMY

OFFICE OF THE SURGEON GENERAL

WASHINGTON 25, D. C., *13 October 1952.*

In Reply Refer To
MEDCL 210.1

Mr. ROBERT L. STERN,
Acting Solicitor General,
Department of Justice,
Washington, D. C.

DEAR MR. STERN: The number of medical and dental officers procured to date by the influence

of Public Law 779, 81st Congress, totals 6,049, of which 3,989 are doctors and 2,060 are dentists. There are two enlisted doctors and dentists now serving in the Army, of which Stanley J. Orloff is one, the other being a dentist. This office is advised that the Department of the Navy also has one enlisted person who is a dentist. To date, the three military services have drafted, as enlisted men, fourteen professionally qualified persons. All of these are now, or will be, commissioned, with the exception of the above mentioned persons.

Sincerely,

(S) Silas B. Hays,

SILAS B. HAYS,
Major General, M. C.
Acting The Surgeon General.

U. S. GOVERNMENT PRINTING OFFICE: 1950